No. 71-865

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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This brief is submitted by Post-Newsweek Stations, Capital Area, Inc. ("WTOP") in response to the brief in opposition to the granting of a writ of certiorari filed by Business Executives' Move for Vietnam Peace ("BEM").

I

In its petition for certiorari, WTOP contended that this case is appropriate for plenary review because, among other reasons for review, it presents major issues of constitutional law not previously considered by this Court relating both to the First Amendment and to the "state action" doctrine (Pet. 7-11). BEM's opposition concedes that the lower court's "decision is constitutionally grounded . . . in the First

Amendment" but appears to dispute that fundamental legal issues are currently presented (Opp. 16).

The court of appeals' elaborate opinion, covering almost fifty pages of argument and analysis, belies any suggestion that the constitutional issues involved are unimportant, limited in scope or directly controlled by any decision of this Court. The decision represents the first judicial declaration that broadcasters are constitutionally obliged to sell "spot" advertising time to private individuals to express their personal views on issues regardless of whether those same issues have been fully and fairly covered by the stations in their normal programming. In short, this case falls directly in the line of cases where this Court has exercised its authority to consider claims that new constitutional rights should be recognized.[1]

BEM suggests that the decision below is narrow because it "did not order any broadcaster to put anyone in particular, not even BEM, on the air" (Opp. 13) and left unsettled the detailed procedures and limitations to be ultimately embodied in FCC guidelines (Opp. 15). Patently, this is far too modest a description of the lower court's sweeping constitutional pronouncements which curtail the long-respected discretion of broadcasters in their presentation of public issues and which elevate editorial advertising to the status of a new constitutional right. There is nothing grudging or unambitious about a decision which directed the Commission to establish rules that will require the entire broadcasting industry to sell time to countless unknown persons to express their private opinions or grievances on the airwaves.

WTOP also asserted in its petition, as an independent ground for certiorari, the direct conflict between the lower

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[1] *E.g., Griswold v. Connecticut,* 381 U.S. 479 (1965) (right of privacy); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964) (right to travel); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (right to counsel).

court's opinion and decisions in the First and Third Circuits.[2] The conflict exists on two separate issues: contrary to the court below, *McIntire* held that no private individual has a First Amendment right to broadcast and, in both *McIntire* and *Hildreth*, the courts held that a station's independent determination not to permit a broadcast does not constitute "state action." BEM's surprising assertion that there is no conflict requires only brief comment.

It is untenable for BEM to suggest that the "dispositive rationale" (Opp. 30) of both cases was that the district courts "lack jurisdiction" to pass upon the claims because primary jurisdiction of complaints is vested in the Commission. The First and Third Circuit opinions plainly show that those courts considered and passed upon the same constitutional issues in dispute here. The partial quotation from *McIntire*, on which BEM essentially relies (Opp. 31), is extracted from a prefatory description that the *McIntire* opinion itself characterized as "general observations respecting the background against which radio broadcasting stations licensed by the Federal Communications Commission operate." 151 F.2d at 599.

BEM also argues that the cases are distinguishable because they involved requests for program time rather than time for editorial advertising. The First and Third Circuit opinions, however, turned on no such distinctions but broadly rejected the First Amendment and state action theories adopted by the court below. The lower court's own opinion forthrightly recognized the conflict between the circuits. Far from seeking to distinguish *McIntire* and *Hildreth* on fanciful grounds, it simply declined to follow them (FCC Pet. 11a).

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[2] *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

II

The greater part of BEM's opposition (Opp. 16-29) is given over to arguments that the constitutional issues presented are not "ripe" for review. Among the intertwined arguments, there appear to be two principal strands: BEM asserts that review now is premature both because the FCC has not yet issued the regulatory guidelines called for by the lower court and because facts allegedly necessary for proper judicial review have not yet been developed in the record.

Neither of BEM's contentions is sound in the present case. The first depends entirely on a misconception of the legal issue that WTOP seeks to have considered in this Court. The second argument, if it were accepted, would warrant not a denial of certiorari but summary reversal of the judgment below.

In support of its first argument, BEM's opposition cites and quotes a number of cases which have in varied circumstances declined to review agency determinations in advance of further resolution by the agency or attempted enforcement (Opp. 20-27). Thus, this Court has declined to pass upon agency determinations which were currently undergoing modification, or which might be clarified in the course of enforcement, or which might never be brought to bear against the complaining party at all.[3] These precedents have no relevance here because, contrary to BEM's suggestion, WTOP is not seeking review of "the legality of a regulation before it is put into effect" or even formulated (Opp. 20).

Far from anticipating legal issues that would arise under particular guidelines, WTOP has requested this Court to consider the anterior constitutional question squarely decided by the court below: whether the First Amendment requires a broadcaster to accept editorial advertising on controvercial

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[3] *E.g., Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426 (1948); *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). Compare *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

issues even though the broadcaster affords the same public issues detailed and balanced treatment in news, interviews and other programs and does so through a variety of representative outside spokesmen as well as through its own commentators. If the existing broadcaster practice in refusing such advertisements is lawful, then the FCC is not constitutionally obligated to formulate *any* guidelines and the decision below must be reversed.

Certainly it is premature to consider whether particular guidelines the Commission might promulgate in the event the lower court is affirmed are adequate, excessive, or otherwise subject to challenge, since the content of the guidelines is conjectural and their application uncertain. There is, on the other hand, nothing whatever conjectural or uncertain about the existing practice of the stations, declared by the lower court to be unconstitutional, nor about the decision's holding that access is constitutionally required. These issues, which logically and practically precede any question about the details of particular guidelines, are in no sense premature.[4]

In a related argument, BEM implies that the question whether the Commission is compelled to formulate editorial advertising guidelines is no longer important because the Commission has voluntarily decided to do so. The opposition states, for example, that the lower court's decision remands the case to the Commission "to explore . . . the adoption of rules that Agency was already considering adopting" (Opp. 20). In fact, what the Commission is considering in its pending *Study of Fairness Doctrine*, 30 F.C.C.2d 26 (1971), and what the lower court commands it to do are very different indeed.

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[4]Fundamental legal issues—whether, for example, a constitutional right exists or an agency has authority to regulate—are often necessarily resolved by the Court well before the precise dimensions or various applications of the right or authority are settled by subsequent cases. *E.g., Baker v. Carr*, 369 U.S. 187 (1962) (application of undefined equal protection principles to legislative apportionment); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (FCC authority over CATV sustained without passing upon CATV regulations).

In its broad-ranging investigation, the Commission has invited comments on the current operation of the fairness doctrine and, as one of several possible lines of inquiry, asked "*whether* there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F.C.C.2d at 33 (emphasis added). The court of appeals' decision does not permit the agency to "explore" this issue at all; quite the contrary, the decision resolves the issue in favor of required access for editorial advertisers, whatever conclusions the Commission may reach about the adequacy of the present regime or the infeasibility of requiring access.

Instead, the lower court has left to the agency only the task of implementing a policy that the Commission has rejected in the past and might well reject again if it were free to make its own determination. The broad policy inquiry the Commission intended to undertake in its *Study of Fairness Doctrine*—to consider whether some form of access is necessary or feasible—has become pointless if the lower court is sustained in its conclusion that editorial advertising is constitutionally compelled.[5] Of course, even the Commission's establishment of guidelines, as required by the lower court's decision, will be an exercise in futility if certiorari is denied now but the decision is overturned after the guidelines have been issued.

In a second line of argument designed to show that the present case is not ripe for review, BEM takes note of the important adverse consequences that broadcasters believe will flow from the new constitutional right of access created by the lower court (see Pet. 10-11, 15-18). Implicitly conceding

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[5]Pursuant to the lower court's mandate, the Commission has recently solicited comments to assist in developing guidelines for editorial advertising "in order to carry out the decision of the Court of Appeals." *Further Notice of Inquiry* in Docket No. 19260, FCC 72-117, adopted Feb. 4, 1972, p. 2. This, of course, is a far narrower inquiry than the originally planned investigation "whether" it is necessary or feasible to require access and if so in what form. 30 F.C.C.2d at 33.

that these consequences are relevant in deciding whether there should be a constitutional right of access, BEM complains that there is inadequate record evidence about the scope and impact of the dangers. Accordingly, its opposition asserts that review of the constitutional questions now would contravene decisions of this Court that such questions should not be abstractly decided in the absence of an adequate record (Opp. 25-29).

This argument impeaches rather than protects the court of appeals' decision. If the constitutional issues in question lack sufficient factual context and maturity to be resolved in this Court, then they were equally unfit for resolution in the court below. Consequently, if BEM's argument were accepted, the judgment of the lower court would have to be reversed and the case remanded to the Commission or held in abeyance to await the outcome of the general inquiry that the Commission originally proposed.[6]

Broad constitutional determinations of the kind involved in this case are customarily premised not on record evidence but on a court's own informed understanding based on prior experience and on information derived through judicial notice. Courts cannot hold legislative hearings before deciding upon general precepts, and prediction is inevitable in framing rules that can only be tested by the passage of years. Certainly with respect to editorial advertising, the supposed practical benefits of compulsory access, relied upon by BEM and the lower court, are not subject to support by record evidence.

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[6]It has not been suggested that the question whether an issue is ripe for adjudication depends on the court in which it is pending. On the contrary, the Court has treated ripeness as governed by general rules applicable to all federal courts (see, *e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)) and has not hesitated to reverse the lower courts when they resolved issues prematurely or on inadequate records. See p. 8 & n. 7, *infra*.

Moreover, the advantages and disadvantages of required access are only one element in this case and it will be time enough to consider the need for further evidence bearing on those issues if and when they prove to be decisive. If, for example, this Court agrees that a broadcaster determination which is neither instigated nor compelled by the Commission is not "state action," then BEM's First Amendment claim fails at the outset. Or, this Court might well resolve the case against BEM on the strictly precedential ground, most recently expressed in *Red Lion Broadcasting Co. v. United States,* 395 U.S. 367 (1969), that the constitutional obligation of broadcasters is the fair presentation of "representative community views" rather than the sale to individuals of commercial "spot" announcement time to broadcast a capsule of their personal arguments and beliefs.

If, nevertheless, this Court were to decide now or on plenary review that the constitutional questions are not ripe because adequate factual information is lacking, then the proper procedure marked out by prior decisions of this Court is to vacate the decision below. This is precisely what the Court did in *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962), which is cited in BEM's own brief (Opp. 22, 27).[7] That step, at least, would free the Commission to pursue the original inquiry which it conceived prior to the lower court's decision and which is directed to determining the need for and feasibility of an access regime.

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[7] Accord, *American Committee v. Subversive Activities Control Board,* 380 U.S. 503 (1965). In both cases, this Court, concluding that the record was not adequate for deciding the important legal questions involved, refused to decide the issues and vacated the decisions of the lower courts which had purported to resolve them. While these two decisions exemplify the customary procedure where adjudication is premature, they do not bear on the question whether the present case is ripe. In both the cited decisions, the undeveloped facts concerned the past actions of the individual litigants and related persons. There is no dispute here about WTOP's practice in this case.

III

The ultimate constitutional questions whether the First Amendment forbids the broadcasters' current practice and compels access for editorial advertising are, manifestly, issues of sufficient gravity and consequence to warrant review in this Court. For reasons already stated, these issues, which the lower court did not hesitate to decide, are equally ripe for adjudication here. In addition, there are urgent practical reasons for immediate review in this Court which were touched upon in the petition but deserve re-emphasis in view of BEM's prematurity argument.

From the broadcasters' viewpoint, the lower court's decision threatens to work a drastic alteration in a regulatory regime which for almost four decades has entrusted stations with basic responsibility for deciding what they shall broadcast. The petition has set forth at length the implications of these changes for the content of broadcasts, the legal responsibilities of broadcasters, and the financial viability of stations (Pet. 15-18).[8] If the lower court is wrong in its determination, review is imperative before its error becomes a *fait accompli* through the promulgation of Commission guidelines.

As the petition also demonstrated, an access regime will necessarily involve the Government to an unprecedented degree in determining what shall be broadcast and is likely to create a political advantage and imbalance in favor of those wealthy enough to afford editorial advertising (Pet. 10-11). The hazards to free speech interests in these consequences are at least as urgent as the comparable interests advanced by the lower court and deserve examination here before any access regime is instituted.

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[8]These important collateral consequences are generally disclaimed by BEM but its own brief confirms them. Thus, while stating that "the fairness doctrine . . . is not in any way affected by the court of appeals' decision" (Opp. 13), BEM's brief thereafter suggests the doctrine must be extended to require broadcasters to underwrite responses to editorial advertising that broadcasters were compelled to accept (Opp. 25, n. 62).

The process of agency administration would also be served by prompt review in this instance. If access guidelines are not constitutionally compelled, there is no reason why the Commission should devote its energy and resources to their implementation, at least in advance of a decision by the Commission that they are necessary and appropriate in the public interest. Indeed, until the lower court's decision is set aside, it makes no sense for the Commission to pursue its inquiry into the basic questions of need and feasibility which the court below declared are constitutionally predetermined. See p. 6 & n. 5, *supra*.

The same considerations favoring immediate review in this Court apply even if it be assumed that the lower court was correct and that some type of access regime must be devised. The adequacy and lawfulness of any guidelines that the FCC might hereafter contrive will, if constitutionally required, depend importantly on the scope and rationale of the underlying constitutional right as it is conceived by the courts.[9] Until this Court has provided guidance on the contours of any such right, any administrative guidelines the Commission may assemble are likely to prove a waste of energy.

Finally, it is unclear how the interest of those claiming a right of required access for editorial advertisements can be hampered by prompt review in this Court. Since the mandate of the lower court has not been stayed, the Commission is proceeding to develop guidelines so there will be no delay in implementing them if this Court reviews and sustains the decision below. It is thus illogical to argue, as BEM appears to do (Opp. 29), that immediate review in this Court can

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[9]If required access for editorial advertising is to be implemented, any number of related procedures, limitations, and consequences may depend on whether such access is based upon a Commission determination that it is in the public interest or whether it is compelled by the Constitution. For example, this distinction may have the most direct bearing on the control a station could exercise over the content of editorial "spots" and on the procedures that might apply when a "spot" were rejected.

interfere with the protection of any valid First Amendment claims BEM may have.

While major constitutional issues may properly be deferred until they are directly presented, this Court has been equally firm in stressing that when they are thus presented, they should be decided in this forum. Ultimately, "in our system . . . [the scope of the First Amendment] presents a question this Court cannot escape answering independently . . . ." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The petition for a writ of certiorari should be granted.

Respectfully submitted,

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